Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose")	)	CC Docket No. 01-117

REPLY COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"), through undersigned counsel, hereby replies to the comments of other parties on the Petition for Forbearance and Rulemaking ("Petition") filed by Mpower Communications Corp. ("Mpower") in the subject docket. For much the same reasons as those cited by ASCENT in its comments, every commenting party other than the incumbent local exchange carrier ("LEC") commenters strongly oppose grant of the Petition. The inadvisability of granting the Petition is also demonstrated by the sweeping conditions which the incumbent LEC commenters would attach to FLEX contracts Mpower advocates, rendering FLEX contracts all but useless to requested carriers but effective anticompetitive tools for themselves. While the incumbent LEC commenters favor grant of the Petition only if such conditions attach, they do not address any of the procedural or structural deficiencies of the Petition. Accordingly, ASCENT again urges the Commission to deny the Petition.

As ASCENT explained in its comments, the Petition fails to attempt to make, much less to demonstrate, a *prima facie* showing that forbearance from full enforcement of either Section 252(i) or Section 252(e) is warranted. That flaw, fatal to grant of the Petition, is also identified by AT&T Corporation ("AT&T"), Focal Communications Corp. ("Focal), and WorldCom, Inc.

("WorldCom"),[1] all of which demonstrate forcefully that forbearance would not be consistent with the public interest. Indeed, as the comments demonstrate, Mpower's request does not satisfy any one of the three essential prerequisites to the Commission's exercise of its forbearance authority. For this reason alone, the Petition should be denied. Even if Mpower had satisfied all criteria for forbearance, however, the Commission could not implement the Petition in the manner demanded by the incumbent LEC commenters. To do so, the Commission would be required to forbear from enforcement of Section 251(c), specifically prohibited by Congress until such time as the Commission can make a determination that the section has been fully implemented;[2] grant of the Petition as demanded by the incumbent LEC commenters would thus force the Commission to go beyond the limits of its forbearance authority.

With respect to the comments in support of the Petition, ASCENT must disagree with Qwest Corporation ("Qwest"), which asserts that "the most reasonable way to deal with the pro-competitive, deregulatory mandate of the 1996 act is by establishing and promoting a structure which encourages ILECs and CLECs to deal voluntarily on a wholesale basis."[3] Congress understood that such a voluntary mechanism would be insufficient to promote competition when one of the participants possesses significantly greater market, and therefore bargaining, power; the comments leave little doubt that a purely discretionary structure would be put to anticompetitive uses. Thus, ASCENT concurs with AT&T's assessment that notwithstanding Qwest's positive

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[1] Comments of AT&T Corp. ("AT&T"), pp. 9-10; Comments of Focal Communications Corp. ("Focal"), pp. 8-9; Comments of WorldCom, Inc. ("WorldCom"), pp. 2-5.

[2] 47 U.S.C. § 160.

[3] Comments of Qwest Corporation ("Qwest"), p. 1.

thinking, grant of the Petition would constitute just that type of "precipitous de-regulation" which "would lead to 'the ultimate re-monopolization of the telecommunications industry.'"[4]

For its part, Verizon "has no objection to the concept of a separate non-regulated track . . . so long as there is no compulsion for a carrier to enter into such negotiations, such agreements cannot be used in evidence in any federal or state proceeding, and the agreements are not subject to regulatory enforcement proceedings."[5] In other words, Verizon wants the ability to selectively determine with which competitors it will deal, perhaps even limiting the universe of such FLEX contract partners to its own affiliates. Obviously, such a result would be incompatible with the Commission's generally-applicable nondiscrimination rules and regulations.

Without acknowledging the historical antipathy of incumbent LECs to voluntarily negotiate with competing carriers, BellSouth Corporation ("BellSouth") adds that "both parties must have the right to decide, at any time prior to signing the contract, to end negotiations and not enter into an agreement."[6] Thus, BellSouth wishes to secure to an incumbent LEC, in addition to having the unilateral ability to refuse to enter into discussions, the ability to enter into, to perhaps prolong such discussions, and then to summarily bring those negotiations to an end, leaving the requesting carrier no choice but to begin the process of negotiating an interconnection arrangement pursuant to Section 251. It is unlikely that competing carriers, knowing this result may occur at any point in the negotiation process, would seek out a FLEX contract. In many instances, business necessity

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[4] Comments of AT&T, p. 2.

[5] Comments of the Verizon telephone companies ("Verizon"), p. 1.

[6] Comments of BellSouth Corporation ("BellSouth"), p. 3.

would dictate the need to embark upon Section 251 interconnection agreement discussions without delay.

As noted above, once it has entered into an arrangement which it deems sufficiently beneficial to memorialize through a FLEX contract, Verizon wants the Commission to totally insulated the terms of that deal from both federal and state scrutiny. No legitimate public purpose could possibly be served by removing supposedly freely negotiated contracts from the review of federal and state agencies, which are tasked with policing potentially anticompetitive carrier behavior. Indeed, the rates which are included by an incumbent LEC in a voluntarily negotiated agreement will be of particular interest to reviewing administrative agencies. Such rates will provide commissions much insight into the appropriate level of TELRIC unbundled element rates and should certainly be considered in related proceedings. Verizon seems particularly agitated that the FLEX contracts it advocates (with the onerous conditions it deems essential to the process) will be used "as a vehicle to reduce unbundled element rates below TELRIC."[7] Obviously, only rates which have been set by the incumbent at an artificially low level would cause such a result. Neither Verizon nor any other incumbent should have anything to fear from regulatory or judicial review of FLEX contracts which contain only legitimate TELRIC rates.

Verizon seeks another condition as well. Under those circumstances in which it has deigned to enter into a FLEX contract, which would be shielded from administrative and judicial scrutiny, the incumbent must be provided the further assurance that the other party to the contract may not avail itself of the Commission's regulatory enforcement mechanisms. Pursuant to Section 208 of the Communications Act, any carrier

[7] Comments of Verizon, p. 3.

> "complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission . . . If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it deems proper."[8]
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> Furthermore,
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> "the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed."[9]

In adopting the accelerated resolution timeframe for carrier-to-carrier disputes, the Commission has stated that "the Accelerated Docket . . . will provide an important step toward both Congress's and this Commission's goal of increasing competition in the telecommunications marketplace."[10] Verizon's condition that parties to FLEX contracts be denied access to the Commission's enforcement mechanisms runs directly counter to the Commission's enunciated goal. Indeed, such a restriction would violate long-standing principles of equity and due process which must not be sanctioned by the Commission.

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[8] 47 U.S.C. § 208(a).

[9] 47 U.S.C. § 208(b)(1).

[10] Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers (Second Report and Order), 13 FCC Rcd. 17018, ¶ 3 (1998).

BellSouth posits that FLEX contracts "must be completely free of all obligations of sections 251 and 252, not just sections 252(e) and (i)."[11] This is an outrageous assertion. BellSouth is undeniably aware that except as provided in section 251(f), "the Commission may not forbear from applying the requirements of section 251(c) or 271 under [section 10(a)] . . . until it determines that those requirements have been fully implemented."[12] Regardless of whether BellSouth and other incumbent LECs would like to be free from the obligations to "open their networks to competition, including providing interconnection, offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold,"[13] its unsupported statement that FLEX contracts must provide such a statutory evasion vehicle is simply incorrect.

AT&T observes that grant of the Petition would "allow incumbent LECs to evade entirely core provisions of the current regulatory system that the Commission as properly recognized are 'central to the statutory scheme and to the emergence of competition.'"[14] The comments of BellSouth and Verizon demonstrate that the incumbent LECs are eager to do just that. AT&T is also correct that the "label is the only thing new about "FLEX" contracts: as Mpower's own description confirms, a "FLEX" contract is simply a negotiated interconnection agreement."[15] No justification exists for exempting it from any of the statutory protections decreed by Congress and

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[11] Comments of BellSouth, p. 3.

[12] Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011, ¶ 67 (1998).

[13] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 (1996) *(subsequent history omitted)*.

[14] Comments of AT&T, p. 1.

[15] Id., p. 2

implemented by the Commission. Accordingly, consistent with the above, the Association of Communications Enterprises renews its request that the Commission deny the Petition for Forbearance and Rulemaking filed by Mpower Communications Corp. as procedurally deficient, substantively flawed and contrary to the public interest.

Respectfully submitted,

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

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